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No. 10

Supreme Court, U.S.
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In The

Supreme Court of the United States

MOHAMMED UDDIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether sentencing courts engaged in their fact finding role violate *Booker* & *Gall*, and presume a Guidelines sentencing range to be reasonable by failing to conduct an inquiry, as permitted by some Circuits, into the weight of evidence presented to them in support of an enhancement that creates the "extreme circumstances" previously recognized by this Court, to wit, an extrapolation loss 60 times greater than the amount the Petitioner admitted to in his plea, 300 times greater than the loss proven through undercover operations, and which increases the Guidelines range from 0-6 to 21-27 months imprisonment.

Whether the District Court erroneously calculated a loss amount over 300 times greater than that proven and 60 times greater than that admitted to by the Petitioner in his plea, and further whether the District Court erroneously calculated the amount subject to forfeiture without either an admission or finding as to what property of the Petitioner constituted "proceeds" of the offense.

LIST OF PARTIES

All parties to this action are listed in the caption.

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CITATIONS OF ORDERS/OPINIONS

United States v. Uddin, 551 F.3d 176 (2nd Cir. 2009).

STATEMENT OF JURISDICTION

The sentence appealed from in this case was imposed by the District Court on July 19, 2007. Appeal was taken to the Court of Appeals for the Second Circuit, and the judgment was affirmed on January 6, 2009. A motion to permit a petition for rehearing was denied on April 3, 2009 in an unreported decision. On March 27, 2009 Justice Ginsburg granted an extension of time to file this petition for writ of certiorari until June 5, 2009. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, REGULATIONS

The relevant provisions of the statutes listed below are reproduced in the Appendix:

18 U.S.C. § 3553(a)

18 U.S.C. § 981(a)(2)(A)

U.S.S.G. 2B1.1 Note 3(C)

7 U.S.C. § 2024(b)(1)

7 U.S.C. § 2016(i)

18 U.S.C. § 641

STATEMENT OF THE CASE

The first question allows the Court to decide if a sentencing court should examine the weight of evidence used to support a specific offense level at sentencing. In the case before the Court, the Petitioner, who ran a convenience store and was charged with fraud offenses related to food stamp benefits, pled to an offense with a dollar value of $5,000.00 or more and admitted to no more than this when he entered his plea. Further, according to the pre-sentence investigation report, undercover activity in the store took place over four days between January and November, 2006. The pre-sentence investigation report detailed that this activity resulted in demonstrable fraud of only $1,201.30. The Government argued for a loss amount of $1,259,330.39; the District Court reduced this amount considerably, to $377,799.27. However, both figures are multiples higher, many times over, from the loss amount that is conclusively proven, namely the $5,000.00 admitted by the Petitioner at the time of his plea.

By reviewing this case, the Court will be able to offer guidance to courts when they are faced with extreme circumstances wherein estimates of loss create a large variance between a defendant's base offense level and the enhanced Guidelines level. This Court has acknowledged that sentencing courts

sometimes face extreme circumstances between base and enhanced Guidelines levels, and that there is a variance in the Circuits as to how to resolve address this issue. *United States v. Watts*, 519 U.S. 148, 156 (1997). This problem still exists in the sentencing era post-*Booker* as this Court allows for substantive reasonableness review of the facts underpinning sentences. *Rita v. United States*, 551 U.S. 338, 353-54 (2007). Further, the Circuits continue to vary in their approach to this problem. *United States v. Gonzalez*, 285 Fed. Appx. 345 (9th Cir. 2008) (clear and convincing standard required for sentencing enhancements); *United States v. Salazar*, 489 F.3d 555 (2nd Cir. 2007) (acknowledging difference between proving a fact for sentencing and weight that fact should be given once proven).

The second question allows the Court to offer sentencing courts guidance on how a sentencing court may make a reasonable estimate of loss from extrapolation evidence. The loss calculation in this case was made almost exclusively from extrapolation evidence, and created an extreme impact on the resulting Guidelines range. The District Court erroneously engaged in speculation to determine this amount, and then committed further error by using this same figure to determine a forfeiture figure, with no inquiry into whether or not the figure truly represented proceeds of a crime, obtained by the Petitioner.

The court of first instance, the District Court of the Southern District of New York, had jurisdiction as the Petitioner was charged in two counts with

violating laws pertaining to food stamp benefits, 7 U.S.C. §§ 2024(b)(1) & 2016, and title 7 C.F.R. § 278.2 in count one and 18 U.S.C. §§ 641 & 2 in count two.

ARGUMENT

In the recent case of *Nelson v. United States*, this Court stated that, "[o]ur cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable." 555 U.S. ___, 129 S. Ct. 890, 892, 172 L. Ed. 2d 719 (2009). In this case, given the extreme circumstance of the large variance between the base offense level and the paucity of evidence in support of the extrapolation loss calculation, the District Court erroneously presumed that a Guidelines range sentence was reasonable by failing to consider the weight of the facts it found in determining the loss amount. Further, the District Court erroneously calculated the loss amount in this case for purposes of determining the loss for Guidelines calculations and the forfeiture amount. Both points presented in this case call for this Court to issue an opinion which will provide guidance for sentencing courts presented with similar issues.

Facts

The Petitioner in this case pled guilty to two counts, 7 U.S.C. §§ 2024(b)(1), 2016, and 18 U.S.C. §§ 641 & 2.

The gravamen of the appeal in the above captioned case was the loss calculation for Guidelines purposes. The Petitioner argued that no evidence of loss beyond $5,000.00 had been introduced which would allow the District Court to make its eventual determination of loss of $377,799.27. On a motion to permit a petition for rehearing, the Second Circuit was asked to consider the weight of evidence in support of the extrapolation loss.

The District Court reached this figure by making various modifications to the evidence presented by the government in support of its position that the loss was $1,259,330.39.

Both the figure decided upon by the District Court and the figure submitted by the Government were reached by extrapolation evidence. The Government put on expert testimony to demonstrate the unusual number of purchases over $50.00, the decline in stock at the Petitioner's store, and a comparison of the high volume of business at Petitioner's store relative to neighboring stores, and further presented evidence from a pole camera of numerous people leaving the store with no groceries.

The sole affirmative evidence of fraud, as referenced in the presentence investigation report,

consisted of a confidential witness who engaged in recorded transactions in which Petitioner unlawfully exchanged approximately $1,201.30 in food stamp benefits, giving approximately $780.00 to the confidential witness. These transactions occurred on four dates over only one year in the period covered by the indictment. Thus, the District Court's ultimate determination of loss reflects an increase of 314 times the amount of fraud conclusively proven by the government.

With a base offense level of 7, the Petitioner, even without an adjustment for acceptance of responsibility and given his lack of criminal history, had a Guidelines sentence recommendation of 0-6 months. The District Court, based on its loss calculation of $377,799.00, reached an offense level of 16 (base level of 7, minus 3 for acceptance of responsibility, plus 12 for loss over $200,000.00 but less than $400,000.00). A. 169 (Citations to A. refer to the appendix on the original appeal).

The District Court did state that the sentence of 21 months would be imposed under the factors of 18 U.S.C. § 3553(a) (A. 178); however, the impact on the sentence of the loss calculations cannot be overstated. The District Court's sentence of 21 months was driven by these calculations. When deciding to allow the Petitioner to remain at liberty pending appeal, the District Court stated:

> THE COURT: Let's put it like this. If the Second Circuit decides that the loss amount

> here is $5,000, I am not going to sentence this man to 28 [sic] months. I think that is pretty clear. I don't think that there is a great likelihood of that occurring.

A. 183. As the quote above makes abundantly clear, aside from the loss calculation, there was no evidence to support a 21 month sentence.

Erroneous Presumption of Reasonableness

As reflected in the quote above, the District Court erroneously presumed the Guidelines range sentence of 21 months was reasonable. Guidelines sentences cannot be presumed to be reasonable. As the Court stated in *Nelson*, "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." 129 S. Ct. at 892 (emphasis in original). The Court's decision in *Nelson* was a product of the *Rita* and *Gall* line of cases (which were issued immediately before sentencing in the instant case and while this case was pending appeal, respectively). As the Court stated in *Gall*, "[a]ccordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, *he may not presume that the Guidelines range is reasonable.*" *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586, 596-7, 169 L. Ed. 2d 445 (2007) (citations omitted, emphasis supplied).

Failure to Consider the Weight of the Evidence[1]

Petitioner respectfully submits that in this case the District Court, after determining the loss amount, should have conducted a separate inquiry into the weight of the evidence used to determine the loss amount. In this case the extrapolation loss figure was the sole factor responsible for a Guidelines range calling for imprisonment.

As this Court has acknowledged, there is, "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *United States v. Watts*, 519 U.S. at 156. The Circuits, post-*Booker*, continue to differ. In the Ninth Circuit, clear and convincing evidence is required for sentencing enhancements, even after this Court's decision in *Booker*. *United States v. Gonzalez*, 285 Fed. Appx. 345. The Second Circuit, adhering to a preponderance of the evidence standard, allows for consideration of the weight of the evidence which was used to establish a fact by a preponderance of the evidence. In *United States v. Salazar*, the Second Circuit observed that enhancements imposed without regard to the weight of evidence in support of them may

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[1] The Second Circuit's opinion issued January 6, 2009, addressed only loss calculation; the issue of weight was presented to the Second Circuit in a motion to allow for a petition for rehearing which was denied on April 3, 2009.

result in periods of incarceration not intended by the Guidelines. 489 F.3d 555. As the Second Circuit stated:

> "[T]he statutory requirement to determine a Guidelines range, and do so in the same manner as before *Booker*, necessarily means that facts relevant to sentencing must be found by a preponderance of the evidence . . . *United States v. Cordoba-Murgas*, 233 F.3d 704, 708-09 (2d Cir. 2000) (holding that the preponderance of the evidence standard is mandated by the Guidelines and drawing a *distinction* between the standard for *proving* a fact relevant to sentencing and the *weight* such a fact should be accorded once proven)."

Id. at 557-8 (Emphasis supplied.).

In this case, given the extreme difference between the base evidence of fraud and the loss found by the court (*i.e.* $1,201.30 in observed fraud by the confidential witness and a plea to fraud in excess of $5,000.00 being used to calculate a total loss of over $377,000.00), the District Court should have conducted an inquiry into the weight of the evidence and its disproportionate impact on the sentence. The failure to do so resulted in a Guidelines range of 21-27 months. While the District Court imposed the bottom of this range, the Petitioner respectfully submits that the extrapolation evidence in this case was of insufficient *weight* to support the argument that a 21 month Guidelines range sentence was reasonable.

Even if a reasonable estimate of the loss is made by a sentencing court (and it is Petitioner's contention that this is not the case in this matter), this does not foreclose a second line of inquiry into the weight of the evidence by the sentencing court. The District Court's failure to conduct this second line of inquiry into the weight of the evidence was erroneous on two counts.

First, it is a substantive defect calling for substantive reasonableness review of the facts used to determine the range. The extrapolation loss used to determine the Guidelines range is too vague to be relied upon for sentencing. Second, it is a procedural defect in that the District Court improperly assumed the enhancement to the Guidelines range was reasonable. This is not simply to repeat the maxim that Guidelines range sentences are not to be presumed reasonable; rather, the additional point here is that given the variables involved with the loss extrapolation, there is an inherent risk of error and unreasonableness in the very determination of the sentencing range.

In its opinion affirming the use of extrapolation evidence to calculate loss, the Second Circuit relied on *United States v. Bryant*, 128 F.3d 74 (2nd Cir. 1997). In *Bryant*, the loss amount extrapolated in that case, $600,000.00, reflected roughly one seventh of the amount proven at trial and supported by other evidence at sentencing. *Id.* at 75. The court in *Bryant* had before it at time of sentencing 22 tax returns for which the defendant had been convicted, totaling

$55,570.00 in underreported taxes. *Id.* Further, the PSR revealed an IRS audit of 1,683 returns with $4,461,633.00 in underreported taxes. *Id.* Thus the $600,000.00 extrapolation, far from being the sole determinate for sentencing purposes, had no meaningful effect on the defendant's sentence.

In *United States v. Sutton*, cited in *Bryant*, this Court affirmed a District Court's sentence in which extrapolation evidence was used to determine loss. 13 F.3d 595 (2nd Cir. 1994). In *Sutton*, the defendant had been convicted of falsely processing 109 driver's license applications, and in sentencing the District Court considered evidence of a further 52 applications in which the DMV had provided supporting information that fraud was involved. *Id.* at 597. Trial testimony proved that bribes paid to process the applications varied between $750.00 and $1,200.00, with a few exceptions for lower amounts. *Id.* In extrapolating the loss, the District Court estimated a figure of $250.00 for each transaction, and multiplied by the total number of transactions for which evidence of fraud was before the court – 159 – to come up with a loss value of $39,750.00. *Id.* Thus, all 159 transactions had some evidence of fraud supporting them, and further the extrapolated loss – $13,000.00 – was just under half of the proven loss of $26,750.00.

The cases cited above address the use of extrapolation evidence to determine a Guidelines sentence. However, each of the sentencing courts had before them substantially stronger proof of both the existence of further frauds, and a reasonable dollar

value to be attributed to each fraudulent act. This greater proof allowed the sentencing courts to give this extrapolation greater weight in determining an appropriate sentence.

It is the lack of weight behind the proof before the District Court in this case which undermines the reasonableness of the 21 month Guidelines sentence. Therefore, absent any inquiry into the *weight* of the evidence supporting the extrapolation, the sentence reflects the sentencing court's presumption that both the loss calculation and resulting Guidelines offense level were reasonable; these presumptions conflict with the Supreme Court's recent decision in *Nelson*.

Finally, in addition to the proposition that Guidelines range sentences are not to be presumed reasonable, Justice Scalia's concurrence in *Gall* (reiterating his position in *Rita*) succinctly encapsulated the objections by trial counsel in this case that the sentence involved to far too great an extent facts found by the court, and not a jury. Justice Scalia stated:

> The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.

Gall, 128 S. Ct. at 602-3.

At the sentencing on July 18, 2007 (roughly one month after *Rita* and five months before *Gall*), counsel for Petitioner stated:

> This strikes me as the kind of case where the difference between what was admitted and even a fraction of what the government says the number is, is so extreme and different that it might actually run up against a jury trial problem, which at least Justice Scalia thinks that there could be an issue when the difference between what is found and what is admitted to is that extreme.

A. 163.

In a case such as the one before the Court, where the extrapolation loss amount is over 300 times the proven loss amount shown by the government, where the defendant has no criminal history, where the only known instances of fraud occurred over a handful of dates in one year and are being used to prove not only loss, but the existence of crimes going back four years, and where the difference between a Guidelines range of 0-6 months and 21-27 months rests solely on this extrapolation evidence, this Court should require sentencing courts to undertake a thorough analysis of the weight of the evidence supporting extreme variations in sentencing, and particularly those cases where such extreme swings rest almost entirely upon extrapolation evidence.

Erroneous Calculation of Loss and Forfeiture Amount

The District Court in this case erred in calculating the loss for Guidelines purposes, and further erred by using this Guidelines loss calculation to calculate the "proceeds" subject to forfeiture in this matter.

Erroneous Loss Calculation

Sentencing courts may make reasonable estimates of the loss for Guidelines loss calculations. U.S.S.G. 2B1.1 Note 3(C). Nevertheless, courts, "must not speculate concerning the existence of a fact which would permit a more severe sentence under the Guidelines." *United States v. Medina*, 485 F.3d 1291, 1303 (11th Cir. 2007).

In the instant case, the evidence presented to the District Court by the Government required the District Court to make just such prohibitive speculations. Two assumptions were made by the District Court in order to extrapolate the loss amount eventually found by the sentencing court. First, there was an assumption as to the decline in stock within the store from 2002 through to 2006 (the period covered by the indictment). Second, there was an assumption made regarding the percentage of purchases over $50 which were fraudulent. Neither assumption was supported by the evidence, and thus both lead to an incorrect calculation of the loss.

The sentencing court discounted the Government's numbers in reaching its decision. Regarding the decline in stock, the court stated, "the government has provided the Court with no evidence from which to determine when this [the decline in stock] occurred." A. 176. Nevertheless, the sentencing court simply went on to assume a steady decline in stock between 2002 and 2006, discounting the Government's methods of calculating the loss but offering no more evidence in support of this analysis than that offered by the Government.

Further, in addressing the fraudulent nature of charges over $50.00, the District Court rejected the Government's theory as to the percentage of such charges which were fraudulent, stating that their theory that every dollar of a transaction over $50.00 was fraudulent was a, "false assumption," and that there was not, "any basis for that assumption in the record here." A. 177. Nevertheless, the District Court simply substituted its own theory for the Government's despite having no more evidentiary support than the Government's.

Both with regards to the decline in stock and valuation of fraudulent transactions over $50.00, the District Court, "engaged in pure speculation. Such speculation is not permissible under the Guidelines." *United States v. Deutsch*, 987 F.2d 878, 887 (2nd Cir. 1993).

Erroneous Forfeiture Order

As detailed above, the District Court erred in its loss calculation. The District Court in turn erred when it used the loss figure to establish the forfeiture amount due in this case. Forfeiture is limited to the amount of property actually obtained by a defendant; this is not the same as the amount of loss caused by a defendant. 18 U.S.C. § 981(a)(2)(A). The District Court erroneously failed to make any determination that the loss figure in fact represented *proceeds* obtained by the Defendant.

CONCLUSION

Wherefore, based on the foregoing reasons, the Petitioner respectfully requests this Court to grant Certiorari so that these important matters may be addressed by the Court.

Respectfully submitted,

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07-3121-cr

United States v. Mohammed Uddin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: October 23, 2008 Decided January 6, 2009)

Docket No. 07-3121-cr

UNITED STATES OF AMERICA,

Appellee,

-V.-

MOHAMMED UDDIN,

Defendant-Appellant.

Before: KEARSE, SACK, and
KATZMANN, *Circuit Judges.*

Appeal from the judgment of conviction of the United States District Court for the Southern District of New York (Stein, J.) sentencing defendant to twenty-one months' imprisonment, two years of supervised release, and forfeiture of $377,799. We affirm, finding that the district court's loss calculation was a reasonable estimate of the loss caused by the defendant, and

that the district court's forfeiture calculation was not plainly erroneous.

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Counsel for Appellee: SHARON E. PRASE (Diane Gujarati, *of counsel*), Assistant United States Attorneys *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

KATZMANN, *Circuit Judge*:

This case calls on us to determine whether a district court's loss calculation was reasonable in the absence of data as to the exact amount of loss. Defendant-appellant Mohammed Uddin appeals from a judgment of conviction of the United States District Court for the Southern District of New York (Stein, *J.*) for food stamp fraud and theft of public property. The district court sentenced Uddin to twenty-one months' imprisonment, two years of supervised release, and forfeiture of $377,799. Because we find that the district court's loss calculation was a reasonable estimate of the loss caused by the defendant, and

that the district court's forfeiture calculation was not plainly erroneous, we affirm the conviction and sentence.

FACTUAL BACKGROUND

Mohammed Uddin owned a small grocery store on Ninth Avenue in Manhattan called Dhaka Grocery Inc. In 2000, Uddin applied to the United States Department of Agriculture's ("USDA") Food and Nutrition Service for a license to redeem food stamps at his store. His application was accepted, and he set up a bank account to receive reimbursements from the federal government for food stamps redeemed at his store.

The government began investigating Uddin's participation in the food stamp program in January 2006. Through a series of transactions initiated by confidential witnesses and video surveillance, the government concluded that Uddin was dispensing cash in exchange for food stamps. Uddin was indicted on November 8, 2006, and was arrested by USDA agents the following day. The indictment charges Uddin with "exchang[ing] several hundred thousands of dollars of customers' food stamp benefits for cash at his Manhattan grocery store in exchange for a share of the cash proceeds." In particular, the indictment alleges two violations of federal law: (1) food stamp fraud in violation of 7 U.S.C. §§ 2024(b)(1), 2016 and 7 C.F.R. § 278.2, and (2) conversion of public money, property, or records, in violation of 18 U.S.C. §§ 641,

2. The indictment also contains forfeiture allegations, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, seeking all proceeds traceable to the commission of the offenses.

Uddin pled guilty to both counts of the indictment without a plea agreement on February 14, 2007. At the plea colloquy, Uddin admitted that he knowingly and intentionally exchanged food stamps for cash in excess of $5,000, the jurisdictional amount, while keeping "some of the money" for himself.

Prior to sentencing, the government argued to the district court that the proper loss amount from Uddin's offense was $1,259,330.39, an amount it calculated by assuming that all food stamp redemptions exceeding $50 between 2003 and November 2006 were fraudulent. Uddin maintained that any losses exceeding $5,000, the amount to which he had admitted at his plea, were not supported by the evidence. The district court held a *Fatico* hearing on May 31, 2007, to assess the loss amount.

At that hearing, the government called two witnesses. Special Agent Christopher Santangelo testified that he learned during the course of his investigation that from 2003 to 2006 Uddin's grocery store redeemed several times the value in food stamp benefits than did two comparably sized grocery stores nearby. Moreover, in 2006 Uddin exchanged food stamps for cash with a confidential government informant on fourteen occasions. Santangelo testified as well about the loss amount resulting from Uddin's

food stamp transactions. To determine that amount, Santangelo estimated, based on his training and experience, that transactions involving $50 or more in such a store were highly unusual; and based on that training and his observations of Dhaka Grocery, his view was that most or all of the food stamp redemptions in excess of $50 at Dhaka Grocery were fraudulent. He characterized this $50 threshold as "a *conservative* figure" because of the (1) limited supply of eligible food items in the store, (2) dusty, outdated stock of eligible items, "which indicated . . . that the eligible foodstuffs in Dhaka Grocery remained on the shelves for long periods of time without being purchased," (3) small size of the store, (4) lack of baskets or carts, which would have made it difficult to purchase large amounts of food, and (5) lack of any delivery service. Santangelo also described video surveillance of the store from 2006, which showed that on days and at times during which Dhaka Grocery claimed to have engaged in large food stamp transactions, "*no* customers appeared to emerge from Dhaka Grocery . . . carrying groceries worth $50.00 or more," most customers appeared carrying small bags or nothing, and "other customers . . . appeared to emerge from [the store] while *counting cash* in their hands." Using this $50 threshold, combined with data that revealed that 82% of the total food stamp benefits redeemed by Dhaka Grocery from 2003 through Uddin's arrest in 2006 involved transactions of $50 or more, Santangelo calculated the loss amount as totaling $1,259,330.39.

On cross examination, Santangelo admitted that he had observed the store only in 2006, not during 2003 through 2005. Defense counsel also brought out that Santangelo had no evidence that the purchases he deemed fraudulent were totally fraudulent – in other words, a $50 purchase could have been partially fraudulent, with the food stamp recipient purchasing food as well as receiving cash.

The government also called Gilda Torres, the officer in charge of the New York office of the Food and Nutrition Service of the USDA, who corroborated that (1) Dhaka Grocery's redemptions were much higher than those of comparable nearby stores and (2) the store reported many large transactions in close temporal proximity. Torres also testified, based on her review of the transaction data and of a November 2006 video that showed the store's limited stock, that the number of over – $50 transactions being reported was unusual. Torres noted further that the store was well-stocked and "full of food" when the license to redeem food stamps first was granted in 2002, but it had very little eligible food in 2006. On cross-examination, Torres agreed that she had not looked at the store's stock at any time other than when she viewed pictures of the store when it first opened in 2002 and viewed the November 2006 video, and that she had not done any statistical analyses on general expenditure patterns in small New York City grocery stores. On re-direct, Torres noted that the average food stamp transaction in a New York City grocery

store was around $12, making the activity in Uddin's small store quite unusual.

The district court sentenced Uddin on July 18, 2007. The court began by finding that the assumptions made by both the government and the defense concerning loss amount were, "to a certain degree, unsupportable." However, it acknowledged that "there is no way to make a precise loss calculation, and . . . the law does not require a precise loss calculation here. . . . So I am doing the best that I can to try to come up with a reasonable estimate of the loss here. . . ." The district court ultimately calculated a loss amount of $377,799. In reaching this number, the court stated that "a reasonable assumption is that the store declined in stock from 2002 until the observations in 2006. Assuming that [it] is true . . . that there was a steady and gradual decrease in the stocking of the store from 2002 to 2006, that would lead the Court to discount the government's proposed loss . . . by half. . . . The 50 percent figure therefore is $629,665." The court then addressed the "false assumption . . . that everything of $50 or more was 100 percent fraudulent," noting that it did not "think there is any basis for that assumption in the record here." Instead, the court stated that it was "prepared to discount the false assumption that 100 percent of the $50 and more purchases were fraudulent by 40 percent, therefore, 60 percent of . . . $629,665 totals $377,799." The district court imposed restitution and forfeiture in the full amount of that loss. Uddin did not object to the amount of the forfeiture order.

DISCUSSION

On appeal, Uddin makes two arguments: (1) there was insufficient evidence to support the district court's calculation of the loss amount, and (2) the amount of the district court's forfeiture order was excessive because Uddin only kept part of the dollar amount of each fraudulent transaction.

A. Loss Amount

"We review the district court's factual findings on loss for clear error and its conclusions of law *de novo*." *United States v. Carboni,* 204 F.3d 39, 46 (2d Cir. 2000). Although the "district court's factual findings relating to loss must be established by a preponderance of the evidence," *United States v. Brennan,* 395 F.3d 59, 74 (2d Cir. 2005), the court "need not establish the loss with precision but rather 'need only make a reasonable estimate of the loss, given the available information.'" *Carboni,* 204 F.3d at 46 (quoting *United States v. Jacobs,* 117 F.3d 82, 95 (2d Cir. 1997)); *see also United States v. Canova,* 412 F.3d 331, 352 (2d Cir. 2005). A district court may make a reasonable estimate "by extrapolating the average amount of loss from known data and applying that average to transactions where the exact amount of loss is unknown." *United States v. Bryant,* 128 F.3d 74, 76 (2d Cir. 1997) (per curiam).

The district court's estimate of the loss in this case was reasonable and supported by a preponderance of the evidence. Given the evidence before the

court that the stock of the store declined between 2003 and 2006 (the period during which Uddin admittedly engaged in the fraud), the district court reasonably estimated that the decline was steady and thus that half the large transactions during that period involved some fraud. The court's use of $50 as a general point of reference for likely fraudulent transactions, even if not based on precise data, was reasonably based on "known" data such as the average dollar amount of food stamp redemptions at small-to-medium size grocery stores in New York City (around $12, according to Torres), and the witnesses' observations of the size, inventory, and setup of Uddin's store. The evidence showed as well both that there was food in the store as late as 2006 and that some customers left the store with items they had purchased. It therefore was reasonable for the district court to estimate that only 60% of the transactions of $50 or more were actually fraudulent. *Cf. United States v. Bryant,* 128 F.3d at 76 (affirming district court's loss calculation when the court extrapolated a loss amount – using an average loss of $100, rather than the higher average of $2400 based on audits performed by the Internal Revenue Service – and noting that the loss amount, "far from being unfair to [the defendant], was highly generous to him"). Although there will undoubtedly be situations in which a district court's estimate of loss amount falls outside the boundaries of reasonableness, we need not define precisely what those boundaries are. It is enough that the district court here did not exceed them.

B. Forfeiture Amount

Uddin did not object to the amount of the forfeiture order below, and thus we review the forfeiture amount for plain error. For this Court to correct the forfeiture amount, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (citation, alterations, and internal quotation marks omitted).

Here, the district court did not commit any error, plain or otherwise. Under 18 U.S.C. § 981(a)(1)(C), "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable" to food stamp fraud "is subject to forfeiture to the United States." "In cases involving . . . unlawful activities, . . . the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and *is not limited to the net gain or profit realized from the offense.*" *Id.* § 981(a)(2)(A) (emphasis added). In this case, the entire amount of the loss determined by the district court was paid by the government into Uddin's bank account. Whether or not Uddin shared the cash he received from the government with the food stamp beneficiary, the entire loss amount paid by the government was diverted from its intended purpose.

As we already have found, this loss amount was reasonable. Because the statute directs that "proceeds" are not limited to net profits from the crime, and because any proceeds directly traceable to food stamp fraud are subject to forfeiture, the district court did not commit error by entering a forfeiture order equal to the entire loss amount.

Uddin also suggests that the loss amount cannot also be "proceeds" for forfeiture purposes because the district court made no explicit finding of what the proceeds were. But the fact that the district court imposed an amount of forfeiture identical to the loss amount implies that it so found. The court was entitled to do so "on evidence . . . presented by the parties at a hearing after the . . . finding of guilt," Fed. R. Crim. P. 32.2(b)(1), in this case, the sentencing hearing. Uddin offers no authority for the proposition that this procedure was error, much less plain error.

CONCLUSION

We have considered all of Uddin's other contentions on this appeal and have found them to be without merit. The judgment of the district court is **AFFIRMED**.

DEFENDANT: MOHAMMED UDDIN
CASE NO.: 06-CR-01031-01 (SHS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	CASE NO. 01: 06CR 01031-01 (SHS)
MOHAMMED UDDIN	USM NO. 59519-054

THE DEFENDANT

Pleaded guilty to count(s) AS CHARGED IN THE INDICTMENT

The defendant is adjudicated guilty of these offenses:

Title and Section	Nature of Offense	Offense Ended	Count
7 U.S.C. 2024(b)(1) & 2016	Food Stamp Fraud	11/30/06	1
18 U.S.C. 641 & 2	Conversion of Public Money	11/30/06	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assignments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 18, 2007

Sidney H. Stein,
U.S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

21 MONTHS ON EACH COUNT TO RUN CONCURRENT. THE COURT GRANTS DEFENDANT'S MOTION TO REMAIN ON BAIL CONDITIONS AS PREVIOUSLY SET PENDING APPEAL.

The court makes the following recommendations to the Bureau of Prisons:

That defendant be incarcerated in the northeast region in order to facilitate family visits.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

TWO YEARS ON EACH COUNT TO RUN CONCURRENT.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

X The defendant shall cooperate in the collection of DNA as directed by the probation office.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as

well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation office;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered,

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS:	$200.00	$0.00	$377,799.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3663(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Ordered	Priority/ Percent.
Clerk of Court (For disbursement to U.S. Department of Agriculture) 500 Pearl Street New York, NY 10007		$377,799.00	
TOTALS			$377,799.00

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the
X restitution

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

X Lump sum payment of $200.00 due immediately, balance due

X Payment during the term of supervised release will commence within 30 days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

X Special instructions regarding the payment of criminal monetary penalties:

Restitution payments shall be made at the rate of 10% of defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X The defendant shall forfeit the defendant's interest in the following property to the United States:

$377,799.00 as set forth in the forfeiture agreement signed by the Court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals for the Second Circuit
Thurgood Marshall Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number: 07-3121-cr

Motion for: Recall of Mandate to Permit Petition for Rehearing	UNITED STATES OF AMERICA, Appellee, -v-
Set forth below precise, complete statement of relief sought:	MOHAMMED UDDIN, Defendant-Appellant
Defendant Appellant moves this Court to recall the mandate issued in this case on January 27, 2009, to allow for a petition to be filed in light of the decision of the Supreme Court in Nelson v. United States, ___ U.S. ___, 129 S.Ct. 890 172 L.Ed.2d 719 (January 26, 2009)	
Moving Party: Mohammed Uddin Appellant/Petitioner	Opposing Party: United States of America
Moving Attorney: Richard P. Lawson	Opposing Party: AUSA Sharon Frase

Law Offices of Richard
P. Lawson 225 Broadway
13th FL New York, NY
10007 (212) 608-2391
richard.lawson@richard
lawsonlaw.com

Has Consent of opposing counsel:
Been sought NO
Been obtained NO

Is oral argument requested:
YES

Has Argument date of appeal been set:
NO

Signature of Moving Party:

Richard P. Lawson March 11, 2009

ORDER

Before: Hon. Amalya L. Kearse, Hon. Robert D. Sack, Hon. Robert A. Katzman, *Circuit Judges*

IT IS HEREBY ORDERED that the Appellant's motion to recall the mandate and permit petition for rehearing is DENIED.

4-3-09

FOR THE COURT
Catherine O'Hagan Wolfe,
Clerk by

Judy Pisnnanont

18 U.S.C. § 3553(a)

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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18 U.S.C. § 981(a)(2)(A)

(a)(2) For purposes of paragraph (1), the term "proceeds" is defined as follows: **(A)** In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission

of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

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7 U.S.C. § 2024(b)(1)

(b) Unauthorized use, transfer, acquisition, alteration, or possession of coupons or authorization cards; restitution by convicted individuals

(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall, if such coupons, authorization cards, or access devices are of a value of $5,000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such coupons or authorization cards are of a value of $100 or more, but less than $5,000, or if the item used, transferred, acquired, altered, or possessed is an access device that has a value of $100 or more, but less than $5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are

of a value of less than $100, or if the item used, transferred, acquired, altered, or processed is an access device that has a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

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7 U.S.C. § 2016(i)

(i) Electronic benefit transfers

(1) In general. –

(A) Implementation. – Not later than October 1, 2002, each State agency shall implement an electronic benefit transfer system under which household benefits determined under section 2017 (a) or 2035 of this title are issued from and stored in a central databank, unless the Secretary provides a waiver for a State agency that faces unusual barriers to implementing an electronic benefit transfer system.

(B) Timely implementation. – Each State agency is encouraged to implement an electronic benefit transfer system under subparagraph (A) as soon as practicable.

(C) State flexibility. – Subject to paragraph (2), a State agency may procure and implement an electronic benefit transfer system under the terms, conditions, and design that the State agency considers appropriate.

(D) Operation. – An electronic benefit transfer system should take into account generally accepted standard operating rules based on –

(i) commercial electronic funds transfer technology;

(ii) the need to permit interstate operation and law enforcement monitoring; and

(iii) the need to pen-nit monitoring and investigations by authorized law enforcement agencies.

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18 U.S.C. § 641

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted –

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

U.S.S.G. 2B1.1 Note 3(C)

*3. **Loss Under Subsection (b)(1).** – This application note applies to the determination of loss under subsection (b)(1).*

> *C) **Estimation of Loss.** – The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. **See** 18 U.S.C. § 3742(e) and (f).*
>
> *The estimate of the loss shall be based on available information, taking into account, as*

appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken or destroyed, or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) The cost of repairs to damaged property.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(v) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.